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No. 322

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

7415

NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY,
a Virginia corporation,
Appellant,

-vs-

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, et al,
Appellees.

BRIEF AND APPENDIX OF APPELLEES

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R. M. F. WILLIAMS, JR.
CLERK

BREEDEN, HOWARD & MacMILLAN
621 Bank of Commerce Building
Norfolk 10, Virginia

WAYLAND K. SULLIVAN, Esq.
Standard Building
Cleveland, Ohio

HAROLD C. HEISS, Esq.
Keith Building
Cleveland, Ohio

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BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, et al,
Appellees.

PROCEEDINGS IN THE LOWER COURT

The appellant carrier instituted this cause in the Circuit Court of the City of Norfolk on September 24, 1956, by filing a Bill of Complaint against the various employee organizations, hereafter referred to as Brotherhoods, and their local officers individually. The purpose of said Complaint was to enjoin said employees from engaging in a work stoppage scheduled for 7:00 o'clock A.M. on September 26, 1956, in protest against the Carrier's refusal to negotiate the hardships and working conditions occasioned to certain of the employees by the Carrier's announced plan to change the customary place of reporting and relief of crews from Port Norfolk in the City of Portsmouth, Virginia, to Berkley in the City of Norfolk, Virginia.

The Bill of Complaint was heard in the state court *ex parte* by the Honorable Lawrence V. Bullock, who was sitting during the vacation of the Honorable Clyde H. Jacob, the Judge of said Court. The first notice the Brotherhoods had of the filing of said Complaint or of said injunction was when the temporary injunction was served upon them.

On October 2, 1956, the several Brotherhoods who were properly served, removed the cause to the United States District Court for the Eastern District of Virginia, Norfolk Division, and all subsequent proceedings were heard by the Honorable Walter E. Hoffman, Judge of said Court. At the same time the Brotherhoods filed a Motion to Dismiss as to C. W. Mathews, as General Chairman of the Brotherhood of Locomotive Engineers, Lodge No. 331 on the ground that C. W. Mathews, though individually served, was not the General Chairman of Lodge No. 331. This Motion to Dismiss was unopposed by the Carrier and was, after the hearing, granted by the Court.

The sworn Answer of these appellees was filed on October 8, 1956, and the matter came on for full hearing on October 9, 1956.

On October 9, 1956, the Carrier filed a Motion to Strike Portions of the Appellees' Answer, which Motion was granted in part and overruled in part during the hearing.

On October 9, 1956, the Carrier was allowed to amend Paragraph 42 of its Bill of Complaint, which amendment constituted a complete reversal of the Carrier's position. In the State Court the injunction was granted on the Carrier's sworn allegation that the appellee organizations could not engage in a work stoppage *until* they first presented their

alleged "grievances" to the National Railroad Adjustment Board. But, as soon as the case was removed to the Federal Court and the Brotherhoods had filed their Answer, the Carrier amended its Complaint, and abandoned its contention that the appellees were obligated by the Railway Labor Act to prosecute their grievances to the Adjustment Board. In its Amended Complaint the Carrier asserted that the injunction should be granted in order that the Carrier could take the alleged "grievances" to the National Railroad Adjustment Board. The Brotherhoods filed an Amended Answer to the Amended Complaint on October 13, 1956.

On October 23, 1956, the Carrier amended Paragraph 35 of its Bill of Complaint and on October 23, 1956, appellee filed an Amended Answer to Paragraph 35.

The evidence in this cause was heard ore tenus on October 9th, 15th and 23rd and was argued by counsel on October 15th and 23rd. Thereafter it was fully briefed by counsel and taken under advisement by the Court.

On December 20, 1956, the Carrier moved for, and the District Judge granted an extension of the state court's ninety (90) day injunction until further order of the Court, and increased the injunction bond from Two Thousand Dollars ($2,000.00), as fixed by the state court, to Ten Thousand Dollars ($10,000.00).

On January 25, 1957, the District Judge filed his opinion, containing the Court's findings of fact and conclusions of law, in which opinion the Court concluded the injunction should be dissolved.

On February 8, 1957, the Court entered its final order on the merits dissolving the temporary injunction and dis-

missing the cause from the docket. On the same day the Carrier filed its Notice of Appeal and moved for, and the Court granted, an injunction pending the appeal.

FACTS

In as much as the Chancellor has written a complete opinion setting forth his findings of fact and conclusions of law, no detailed restatement of the facts is required. If the appellate court is interested in a detailed factual account, its attention is invited to the Chancellor's opinion.

A summary of the general factual background is offered herewith in order to correct certain misconceptions contained in the appellants' brief.

The operative facts are these: From 1898 until 1956, employees of the Norfolk-Portsmouth Belt Line Railroad reported to work on the Portsmouth side of the Elizabeth River at Port Norfolk, which is located in the City of Portsmouth, Virginia. There existed between the parties a well established custom that whenever men were required to work at any other point than Port Norfolk, they would first report to Port Norfolk and then be transported from Port Norfolk to the particular point where work was to commence on the Carrier's time and in Carrier furnished vehicles.

In the Fall of 1955, the Carrier decided to change the place of reporting and relief for some five or six crews (25-30 men) from Port Norfolk to Berkley, in the City of Norfolk, Virginia. This decision was not communicated to the Brotherhoods by the Carrier, but became obvious when the Carrier commenced the construction, at Berkley, of employee locker rooms and shower facilities as required

by existing collective bargaining contracts between the Carrier and the Brotherhoods.

On November 25, 1955, the Brotherhoods wrote the Carrier's president asking for a conference to discuss the change in working conditions that would be occasioned by the proposed change of reporting and relief points. The Brotherhoods' letter was ignored by the Carrier from November 25, 1955 until February 10, 1956, when a conference was held in the Carrier president's office. Present at that conference were the Carrier's president and general manager and the Brotherhoods' general chairmen. Without detailing the events of that conference the Chancellor has found that the Carrier refused to negotiate an agreement with the organizations to cover the hardships and working conditions that would result from the change in reporting point from Port Norfolk to Berkley. The evidence is also clear that the organizations told the Carrier at that conference that they did not object to the change of reporting point from Port Norfolk to Berkley, but that they did object to being required to go to Berkley without having an agreement covering hardships and working conditions which would result from the change of reporting and relief point.

When the Carrier refused on February 10, 1956, to negotiate an agreement covering hardships and working conditions that would result from the proposed change, the Brotherhoods, on February 13, 1956, sought the aid of the National Mediation Board. The Board, by letter of March 5, 1956, declined jurisdiction as the Carrier had not, at that time, formally posted notice of the change, so that an actual dispute did not exist.

On April 26, 1956, however, the Carrier did formally post notice of the change, effective May 2, 1956. Simultaneously, the Brotherhoods served notice on the Carrier that it would strike on May 2, 1956, in protest against the Carrier's refusal to negotiate, as required by the Railway Labor Act, an agreement to cover the proposed change in working conditions.

On April 26, 1956, the Brotherhoods again notified the National Mediation Board of the impending strike and sought its assistance. On this occasion the Mediation Board promptly intervened and proffered its services. A mediator was sent to Norfolk by the Board on May 2, 1956. Initial mediation commenced but was continued on motion of the Carrier. (See Carrier's letter of May 2, 1956, Defendants' Exhibit No. 3). The parties resumed mediation late in May, 1956, and continued until all hope of settlement by mediation was exhausted.

The mediation concerned two points only: "continuous time" (wages) and "transportation expenses."

When mediation failed on the local level, the parties were directed to appear in Washington on July 23, 1956, to make a final effort to reach a settlement under the guidance of a member of the Mediation Board. The parties met on July 23rd and discussed the matter all day. Toward the end of the day a proposal for settlement was made by the Mediator. The proposal was signed by the Mediator and the Brotherhoods, but was subsequently rejected by the Carrier. The Chancellor refused to admit this proposal as evidence of the items in dispute between the parties, and same is marked "Defendants Exhibit 4, Refused."

On August 16, 1956, after the Carrier had rejected the aforementioned final proposal of settlement, the National Mediation Board notified the parties it was terminating its services and closing its file on the case. After waiting thirty days, the Carrier, on September 21, 1956, posted notice of its intention to change the reporting point for five crews, effective at 7:00 o'clock A.M., September 26, 1956.

On September 24, 1956, the Brotherhoods notified the Carrier of their intent to strike at 7:00 o'clock A.M., September 26, 1956, as there was no agreement as to wages and transportation expenses in effect for the proposed reporting and relief point.

On September 25, 1956, the Carrier, without notice, and while the regular Judge was on vacation, sought and obtained *ex parte* an injunction in the Circuit Court of the City of Norfolk against the proposed strike.

The effect of the injunction was not only to prevent the strike, but also to require the men to report at the new reporting point against their will and without any agreement as to compensation or travel expense. The injunction, while "preventive" as to strike, was "mandatory" in requiring the men to work without an agreement as to "continuous time" and "transportation expense."

THE DECISION OF THE CHANCELLOR

The District Judge sitting as a Chancellor has resolved the issues between the parties in favor of the appellees. The controlling issue between the parties is whether or not their dispute is a "major" or a "minor" dispute within the meaning of the Railway Labor Act. The Chancellor found and the evidence clearly shows that the dispute involved was

the negotiation of an agreement for "continuous time" and "transportation expense," and that such was a "major" dispute.

The Chancellor further found that all preliminary procedures required by the Railway Labor Act had been complied with by the appellees before a strike date was set, and, therefore, the appellees had a legal right to strike on September 26, 1956 when the State Court injunction was issued.

If this Court accepts the facts as found by the Chancellor, as it must if supported by the evidence, then no other legal conclusion can be reached than that reached by the District Judge. The only issue that can be raised on appeal is whether or not the record supports the factual finding of the Chancellor. In that regard, the appellees submit that the determination of the District is clearly right.

Point I: The Dispute Between the Parties is "Negotiable."

Determining what the dispute was between the parties is a factual matter and can be resolved only by the evidence. The sole evidence in the record as to what the dispute was appears in the testimony of Mr. Hayes, the principal witness called by the Brotherhoods. The first and only conference the Brotherhoods had with the Carrier's president was held in the president's office on February 10, 1956. Witness Hayes gave this account on the dispute raised at that conference: (See Appendix p. 2)

> "Q. When you met at that time what, if anything, did Mr. White have to say about the proposed change from Port Norfolk to Berkley?

A. Well, Mr. White told us at the outset of this conference that it wasn't called for the purpose of negotiating an agreement to cover this change in working conditions; that it was his position that under the contract rules then existing that he was privileged to make this change.

Q. Did he offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, which at that time was 80 cents on public transportation.

Q. Is that one way or round-trip?

A. I understood that to be per day.

Q. Round-trip?

A. That would be round-trip."

The Carrier has argued that the dispute between the parties was that the Brotherhoods denied the Carrier's right to change the point of reporting and relief from Port Nor-

folk to Berkley unless the Brotherhoods consented or agreed to the change. But the evidence does not support that contention. In this regard, see the Appendix page 3, where Mr. Hayes testified:

"Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our complaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it.

Q. Did Mr. White at that time give you any indication as to when the change might go into effect?

A. No, sir. He said that it might be the next week or the following week; any time, a short while after this conference.

Q. Was there any suggestion that negotiations regarding this change in working conditions would be entered into before the change has to be made?

A. No, sir. He told us very definitely that he wouldn't entertain any conference for that purpose.

Q. What then did you do after the conference of February 10th, 1956, with Mr. White?

A. We immediately requested the Mediation Board to invoke its services."

In discussing what the Brotherhoods negotiated with the Carrier during mediation, Mr. Hayes said; (Appendix p. 8):

"Q. What did you then negotiate with the complainant and the defendant? I am not asking you details or terms. What were the items in dispute?

A. The travel time from Port Norfolk to Berkley and the expenses, transportation expense."

Mr. Hayes also testified that the Brotherhoods never negotiated with the Carrier its right to make the change. (Appendix p. 19, 20)

"Q. (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complaint over his right to move the place of reporting and relief from Port Norfolk to Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management.

Q. Why did the defendants schedule the strike which was called on both May 2nd, 1956, and September 26, 1956, for the same hour which the carrier had scheduled the move from Port Norfolk to Berkley?

A. Well, that was the date and time that these hardships would have been imposed by this change on the men and an agreement had not been worked out to take care of this one hour travel time in each direction

and this expense involved which we considered hardship."

Even the Carrier acknowledged that the dispute involved the hardships resulting from the change. See page 21 of the Appendix where Carrier's counsel asked this question of Mr. Hayes on cross-examination:

Q (By Mr. Wilcox) Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norfolk to Berkley?

A. I don't know that I understand your question, Mr. Willsox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods pro-

viding for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir."

The several quotes hereinabove set out are the sole testimony in the transcript as to the dispute between the parties. On that state of the evidence, the trial court was justified in finding that the dispute involved the negotiation of an agreement to cover the changed working conditions (travel time and transportation expense) that would be occasioned by the change of the reporting and relief point from Port Norfolk to Berkley.

The Chancellor ably pointed out in its Memorandum of Opinion at page 13 that "there would be no occasion to negotiate the issues of continuous time and transportation expense unless defendants conceded that the Carrier had the inherent right to make the change" of reporting point. As a prerequisite to negotiating hardships the Brotherhoods concede the Carrier had the absolute pov .: and inherent right to change the reporting point from Port Norfolk to Berkley without the consent or agreement of the Brotherhoods.

In their sworn Answer to the Complaint filed, in their opening statement, in the testimony of their officers given

in this cause, in their closing argument, in the briefs filed in the Lower Court, and now in this appellate brief, the Brotherhoods admit, concede and acknowledge that the Carrier, in the exercise of its managerial prerogative, and without regard to the wishes of the Brotherhoods, has the inherent right as management to change the designated point of reporting and relief. Under this state of the facts, the sole dispute involved is negotiating an agreement to adjust the hardship occasioned by the change of the reporting and relief point.

This evidence shows clearly why the case of *New York Central Railroad Company vs Brotherhood of Railroad Trainmen*, D. C. Ohio, 140 F Supp. 273, decided May 1, 1956, has no bearing on the issue in this case. In the *New York Central* case the court found as a factual matter that the strike there involved was called to protest the change of location of a station without the consent of the Brotherhoods. There the right of the Carrier to make the change was denied. The Carrier there offered to negotiate the hardships occasioned by the change, but the employees denied the Carrier's right to make the change at all. Here the dispute involves the making of an agreement to cover the change of working conditions caused by the change of reporting and relief point. The District Judge properly found the *New York Central* case was not applicable to the dispute in this cause.

The hardships resulting from the change here contemplated are very real. The practical effect of the change is that employees who have established homes in Port Norfolk, the customary reporting point for 58 years, must spend an additional 2½ hours a day traveling on public conveyance

to and from work, plus an additional transportation expense of 80 cents a day for bus and tunnel fare. (Appendix p. 3) The effect of the state court injunction was to force the individual employees affected to work this extra time and incur this extra expense against their wills. (Appendix p. 35 and 41). This condition has continued since September 25, 1956, when the state court injunction was entered and still continues during this appeal. Forcing railroad employees to work without compensation and thus, against their wills is in violation of Section 2, Tenth of the Railway Labor Act (45 USCA, Section 152, Tenth), which provides:

> "****Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Where a carrier proposes to change the working conditions of the employees to such an extent that the established practice of transporting men on company time is to be changed, the carrier is required to negotiate such change in working conditions with the employees. Such is the clear requirement of Section 2, Seventh of the Railway Labor Act (Title 45, USCA, Section 152, Seventh) which provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in Section 6 (Title 45, USCA, Section 156) of this Act."

Section 6 of the Railway Labor Act (Title 45, USCA, Section 156) provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The carrier cannot change working conditions and established customs so as to require the employees to work 2½ hours more a day and to spend 84 cents money per day in transportation without being required to negotiate such changed working conditions. The Carrier refused to negotiate the proposed change in working conditions on February 10, 1956. Later, negotiations were held during the mediation, but failed.

In its brief, the Carrier asserts that the Opinion of the Court is not supported by the evidence. This is a grave charge and must be dealt with specifically.

At page 19 of its brief, the Carrier says there is no evidence to support the Court's finding that the sole dispute negotiated during mediation was "continuous time" and "travel expense." It is true the Court, on the objection of the Carrier, refused to hear or admit in evidence the terms of offers of settlement and compromise that passed back and forth between the parties during mediation: That is, the number of hours travel time and transportatic . expense to be allowed. In this regard, the Court even rejected Defendants' Exhibit No. 4 which was the final proposal of settlement that was considered by the parties and approved by the Mediation Board. But the Court did admit much of what occurred during mediation. The Court specifically allowed the parties to testify as to what dispute was negotiated during mediation. See Appendix p. 8.

> Q. What did you then (during mediation) negotiate with the complainant and the defendant. I am not asking you for details or terms. What were the items in dispute?
>
> A. The travel time from Port Norfolk to Berkley and the expenses, transportation expenses."

This testimony was not contradicted. No witnesses for the Carrier testified that the parties ever negotiated the question of the Carrier's right to make the change. On the contrary, the evidence shows that the Carrier's right to make the change was never denied. See Appendix p. 19:

> "Q. (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complainant over his right to move the place of reporting and relief from Port Norfolk to Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management."

The Carrier has tried vainly to read into the Brotherhoods' letters of November 25, 1955 and February 13, 1956, a denial of the Carrier's right to make the change. All that those letters say is if the Carrier makes a change in the designated reporting and relief point, the Carrier cannot refuse to negotiate an agreement to cover the change in working conditions or hardships, occasioned by the change of reporting point. Such negotiation is specifically required by the Railway Labor Act (Title 46, USCA, Section 152, Seventh).

The Carrier also attacks the lower court opinion at page 24 of his brief. He says:

> "In this case, there is absolutely not a word of evidence in the correspondence, the telegram, the pleadings or the testimony that the defendants have ever asked for or demanded any additional compensation."

The Carrier must not be familiar with the record or such a representation could not be made to the Court. The parties first met on February 10, 1956 in the Carrier President's office to discuss this dispute. At this very first meeting the Brotherhoods communicated their demands to the Carrier's President who refused to negotiate the demand with them. See testimony of Hayes, Appendix p. 3:

"Q. Did he (carrier's president) offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, what at that time was 80c on public transportation.

Q. Is that one way or round trip?

A. I understand that to be per day.

Q. Round trip?

A. That would be round trip.

Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our com-

plaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it."

This evidence was uncontradicted. Thus, the record is clear and unequivocal that at their first conference, two months before mediation began, the Brotherhoods admitted the Carrier's right to make the change and were demanding compensation of one hour's travel time and 80c allowance for transportation expense. But, the Carrier refused to negotiate these wage and transportation expenses demands until forced to do so by the National Mediation Board.

No one present at the trial or familiar with the transcript of the record could deny that the findings of the trial court are not only supported by the record, but are actually based on uncontradicted evidence.

Point II: This Dispute Does Not Involve the Interpretation of a Contract or Rule so as to be within the Jurisdiction of the National Railroad Adjustment Board.

As indicated in Point I, the dispute between the parties as shown by the evidence and as found by the Chancellor is one involving the negotiation of an agreement concerning the change of working conditions occasioned by the change of reporting and relief point from Port Norfolk to Berkley.

The only provision in the several labor agreements involved even relating to change of reporting point is as follows:

"(a) Yard crews shall have a designated point for

going on duty and a designated point for going off duty.

"(b) The point or going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

The Carrier contends the above rule makes it unnecessary for it to negotiate a change of working conditions with the Brotherhoods.

The above rule, with unimportant differences, appears in all labor contracts of all railroad employees in the United States. This uniformity results from the fact that such rule was originally promulgated during World War I when the Federal Government set up a Committee of Eight to regulate the several railroads (including this Carrier). The above rule was promulgated as Article XVIII in Supplement No. 15, General Order 27 of said regulating body.

Prior to the promulgation of this rule, management could require an employee to report for work at one point (frequently far removed from his abode) and relieve him at another point (frequently far removed from his abode and lacking transportation facilities), and change his reporting and relief point daily. To correct this hardship, subparagraph (a) of the above rule was promulgated; *not*, however, to give the carriers a right to designate the point of reporting and relief (as they had always had that right as the inherent prerogative of management), but, rather, to control the unfair exercise of that right by requiring the Carrier to designate a definite point of reporting and relief.

In short, the rule was enacted to protect the employees by requiring the Carrier to designate a definite reporting and relief point. See Award No. 12,664 of the National Railroad Adjustment Board where the Board said:

> "The rule in question is negotiated for the protection of the employee."

The rule does not add to the Carrier's managerial power as this Carrier contends. The Carrier already had the absolute power to designate the reporting and relief point before the rule was promulgated. The rule limits the Carrier's absolute power of designation by providing that a point must be designated and adhered to with reasonable regularity.

Subparagraph (b) of the rule merely provides that in designating the point, local conditions shall determine what point is selected, giving examples of customary points.

The history, intent, meaning and application of this contract rule has been repeatedly construed by the National Railroad Adjustment Board. Without exception the Adjustment Board has given the meaning and interpretation asserted by these Brotherhoods. For these decisions of the National Railroad Adjustment Board, see Award Nos. 12,664; 10,603; 12,035; 14,941. The only objection the Carrier voices to these decisions is that in each of the decisions the Adjustment Board made a finding that it had jurisdiction of the parties. It will be noted that the allegation of jurisdiction in the decisions relate to the finding that the carrier party and the brotherhood are employer and employees within the meaning of the Railway Labor Act. That finding gave the Adjustment Board sufficient jurisdiction of the parties to consider whether or not the dispute was one over which the Board had jurisdiction. In each case the Board

found it had jurisdiction of the parties but not of the dispute because it was a negotiable matter which the parties could only decide by agreement.

The Carrier has contended that these Brotherhoods should file time claims with the Carrier and then upon rejection of their claims by the Carrier, they should present their claims to the Adjustment Board for an allowance of such time and transportation expense as has resulted from the change from Port Norfolk to Berkley. Appendix p. 30. The Carrier say Rule 18 will support such claims. This is not a novel suggestion and time claims have been processed to the Adjustment Board on numerous occasions.

On each such occasion, however, the Adjustment Board has refused to take jurisdiction of such time claims filed under this rule on the ground that *the Adjustment Board's sole duty is to interpret existing agreements, not to make agreements for the parties where they cannot agree.* The Board has uniformally held time claims based on hardships resulting from the change of reporting and relief point is a negotiable matter; that is, a matter that can be settled only by negotiation and agreement between the parties themselves; no such agreement can be imposed on the parties by the Adjustment Board. Thus, the Carrier party in Award No. 12,035 resisted time claims filed by their employees under this rule as follows:

"POSITION OF CARRIER:
JURISDICTION QUESTIONED

The claim here involved amounts to nothing less than a demand for a change in the agreement between the Carrier and the Brotherhood representatives. The

agreements hereinafter quoted make it clear that the Carrier has the undoubted authority to determine the starting point and the relieving point; it is left to the discretion of the Management. No provision of the agreements has been violated. The demand, in effect, is to supply transportation, which is equivalent to demanding added pay, expended in the form of a transportation charge.

Therefore, the question involved is one for negotiation between the parties, which would ultimately be referable to the Mediation Board, and consequently it is most respectfully represented that the Adjustment Board has no jurisdiction over the question involved, and it is requested that jurisdiction be denied."

The Adjustment Board adopted the carrier's view and dismissed the employees' request as follows:

"The request as submitted appears to be one for negotiations. Award: Request dismissed."

To the same effect, see Award 10,603.

In every case that has gone before the Adjustment Board based on Rule 18, the carrier party has contended Rule 18 merely required the carrier to designate a reporting and relief point. The carrier party has always contended any hardship or altered working condition occasioned by the change of point is a matter to be negotiated and contracted for between the parties and the Adjustment Board had no jurisdiction of the matter.

Thus, the numerous decided opinions of the Adjustment Board in identical cases are added support to the trial court's determination that Rule 18 cited by the Carrier was not involved in this dispute and, therefore, the dispute be-

tween the parties was a negotiable dispute and not within the jurisdiction of the Adjustment Board.

In *Elgin, Joliet & Eastern Railway Company vs Burley, et al*, 325 US 711, 25 S. Ct. 1282 (1944), the Supreme Court draws the distinction between disputes concerning the *making* of new agreements covering rates of pay, rules or working conditions which are termed "major disputes," and disputes growing out of "grievances" or out of the interpretation or application of *existing* agreements which are designated "minor disputes." Only the latter disputes are within the jurisdiction of the National Railroad Adjustment Board.

The Court drew this distinction as follows (page 722):

"The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. *******

"The statute first marks the distinction in Section 2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

"The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the

issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have *vested* in the *past*.

"The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreemnt, e. g., claims on account of *personal injuries*. In either case the claim is to rights accrued, not merely to have new ones created for the future.

"In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. * * * * * * * (Underscoring added)

In its brief appellant argues that the action of the District Judge is inconsistent with the recent decision reached by the Supreme Court in the case of *Brotherhood of Railroad Trainmen, et al vs Chicago River & Indiana Railroad Company, et al*, decided March 27, 1957, US

That case has no bearing on the issues in this cause.

The *Chicago River* case involved 21 contract "*grievances*" the employees had with the carrier, which grievances grew out of the interpretation and application of existing collective bargaining agreements. *All parties admitted that the dispute in that case was a "minor" dispute according to the test laid down in the Burley case, supra, and a dispute*

within the jurisdiction of the National Railroad Adjustment Board. The holding of the *Chicago River* case is that the Railway Labor Act deprives the employees of their right to strike over "minor" disputes while such dispute is pending before the National Railroad Adjustment Board. The decision makes it clear that the Railway Labor Act has not deprived the employees of the right to strike in cases of "major" disputes where negotiations, under the auspices of the National Mediation Board, fail. The pertinent portion of the decision states (page ....):

> "The grievances for which redress is sought by the Brotherhood are admittedly "minor disputes" as that phrase is known in the parlance of the Railway Labor Act. These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee. Section 2. Sixth. They may be contrasted with "major disputes" which result when there is disagreement in the bargaining process for a new contract. Section 2. Seventh. See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-724.

The lack of merit in the Carrier's position on appeal can be seen by its contention that the filling of an application with the Adjustment Board seeking a determination of an alleged dispute over the interpretation of an existing agreement is grounds for an injunction. That would be true if the dispute involved the interpretation of an existing contract. The trial judge has found by the uncontradicted evidence that the sole dispute between the parties was a "major dispute;" that is, a dispute involving the negotiation of an agreement to cover new working conditions resulting from the change of the reporting and relief point.

The Carrier's application to the Adjustment Board is

a sham, and a device to attempt to confuse the "clear cut" record before this Court. The state court injunction was obtained on the Carrier's sworn statement that the Brotherhoods could not strike until they (the Brotherhoods) went to the Adjustment Board. The state court injunction was granted ex parte. As soon as the cause was removed to the Federal Court, the Carrier changed its position entirely and amended its sworn pleadings, asking the Federal Court to make the injunction permanent while the Carrier took the alleged contract dispute to the Adjustment Board. Months elapsed before any submission was made to the Adjustment Board; and then only after the trial in the lower court was concluded and all of the evidence was against the Carrier.

The trial court refused to permit the Carrier to file in evidence the submission to the Adjustment Board (proffered long after the trial was concluded) on the ground it was irrelevant. No objection or exception was, or has been taken or raised to the court's action. The submission is irrelevant because the facts at trial showed conclusively that the dispute was one involving the negotiation of a new agreement. The Adjustment Board has no jurisdiction of said dispute.

The weakness of the Carrier's brief is that it cites good law, but the law is not applicable to the uncontradicted facts as developed at the trial. Had the trial court found the dispute was a "minor dispute" then that factual finding would have brought the case within the law urged by the Carrier. But, the Court having found that the dispute was a "major dispute," then the cases dealing with "minor disputes" have no applicability.

It is clear from the foregoing that this dispute is a "major dispute" over which the Adjustment Board has no

urisdiction. This cause involves a dispute that can only be ettled by negotiation and agreement between the parties. The Adjustment Board cannot make an agreement for the parties in this cause.

POINT III: The Appellees, having complied with the Procedural Requirements of the Railway Labor Act, had the Right to Strike when Enjoined by the State Court.

CONCLUSION

In Point I, the Brotherhoods have shown from the evidence that this dispute is negotiable and, therefore, is a "major dispute." In Point II the Brotherhoods have established that the Adjustment Board has jurisdiction of "minor" disputes only, so had no jurisdiction of this dispute.

The remaining question, therefore, is whether or not the Brotherhoods have complied with the procedural requirements of the Railway Labor Act so that they are now free to strike. The Chancellor found that the Brotherhoods had complied with the Act. The evidence conclusively supports the Chancellor's finding on this point.

The evidence shows that the Brotherhoods first notified the Carrier of their dispute on November 25, 1955. That on February 10, 1956 all parties met in the office of the President of the Carrier, at which time the Brotherhoods were told the Carrier would not negotiate with them this question of hardships (although required to do so by the Railway Labor Act).

Both on February 13, 1956 and again on April 26, 1956, when all hope of negotiation with the Carrier had

terminated, the Brotherhoods sought the assistance of the National Mediation Board, whose services were proffered on May 2, 1956. Thereafter, the parties exhausted mediation on the local level and before a Board Member in Washington on July 23, 1956.

In due course, arbitration was offered and rejected, and on September 16, 1956, the Mediation Board released the parties and closed its files. This releasing of the parties by the Mediation Board constituted acknowledgement that all procedural requirements of the Railway Labor Act had been complied with by the parties and that they were free to use self-help, which included the right to strike.

In the *Elgin* case, *supra*, the Supreme Court outlined the procedural requirements governing major disputes at page 725:

> "Beyond the initial stages of negotiation and conference however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. Section 7; *Trainmen v. Toledo, P. & W. R. Co.*, 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. Section 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. *The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intented, un-*

less the parties themselves agree to arbitration."
(Underscoring provided)

All of these requirements have been complied with.

In desperation the Carrier contended in the District Court and at page 25 of its brief, that the Brotherhoods had failed to give the Carrier the notice provided for in section 6 of the Railway Labor Act (Title 45 USCA, Section 156), which is set out above at page 16.

Without discussing whose duty it was to give the notice, or if it was the Brotherhoods' duty, whether or not the letters of November 25, 1955, February 10, 1956, and February 13, 1956, constituted due notice, the question raised by the record in this case is whether or not the Carrier waived formal notice by negotiating the dispute of hardships with the Brotherhoods under the auspices of the Mediation Board. The Carrier admittedly mediated this dispute with the Brotherhoods for four days in Norfolk and one day in Washington. The sole issues mediated were "continuous time" and "transportation expenses."

The Brotherhoods submit that the Carrier cannot negotiate a dispute for five days and then when agreement cannot be reached, contend that it did not receive formal notice of said dispute. If a defendant appears on the trial day without formal notice, and the cause is tried and judgment goes against him, he cannot contend he had not been formally served with notice. The Carrier's contention is not novel. The same contention was made without success in *McMullans vs. Kansas, Oklahoma & Gulf Railway Company*, 10 Cir., 229 F (2d) 50, certiorari denied, 351 US 918.

Beginning at page 26 of its brief, the Carrier asserts the Brotherhoods had not taken all the steps required of them

by the Railway Labor Act. As indicated above, the only steps required to be taken by the Brotherhoods was to negotiate with the Carrier separately or under the auspices of the National Mediation Board, and to maintain a status quo until released by the Mediation Board. The Carrier stipulated at trial that the issue was negotiated during mediation. (Appellants App. p. 17.)

All other procedures for settlement were voluntary or permissive and whether or not they were done is immaterial. These Brotherhoods had complied with the Railway Labor Act when they did those acts required of them. When the National Mediation Board released the parties, they were free to seek self-help. The Court will recall that the Mediation Board did not release the parties until after the Carrier had rejected the final proposal of settlement which was agreed to by the Brotherhoods and approved by the Mediator. The Carrier admitted that the Mediator suggested arbitration to both sides. See Appendix p. 47 where Carrier's President said:

> "A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested *all the possible means of settling the dispute.* But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. *It was just one of the suggestions that were made I suppose to both sides by the mediator.* We have not received any offer to arbitrate from the organizations nor have we made any."

The Carrier, at page 28 of its brief, in discussing the

fact that the Carrier admittedly never offered to arbitrate the dispute said:

> "Apparently the Court was of the opinion that such failure was fatal to the Belt Line's case."

Actually, the Court merely stated that the Carrier's failure to exhaust the remedy of arbitration before seeking an injunction, might be a prerequisite to the granting of an injunction. *Trainmen v. Toledo P. & W. R. Co.*, 321 US 50, 64 S. Ct. 413, 88 L. Ed. 534. Of course, the evidence is clear that the Mediator discussed arbitration with both parties (Appellant's app. p. 18; p. 26) but it was unfruitful, as neither party was willing to submit to arbitration. What more can the Mediation Board do if the parties do not wish to submit to arbitration. So much for the Carrier's objection as to Section 5. First (45 USCA Section 155. Firts).

The Carrier's other objection is that the Mediation Board did not notify the President of the United States of this dispute in order that the President could appoint a board to investigate and report respecting such dispute. Title 45, USCA, Section 160 specifically vest in the Mediation Board the discretionary power to determine whether or not the disputes "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." The Mediation Board is not required in every case to notify the President; by its letter releasing the parties it is clear the Mediation Board felt it could be of no further service and released the parties from its jurisdiction.

It is obvious from the above that the Carrier seeks to hold these Brotherhoods responsible because the National Mediation Board did not, in its judgment, feel the President

should be notified of this dispute. The Carrier also seeks to hold these Brotherhoods responsible because the Carrier was not willing to arbitrate.

Nothing is more basic or settled than that the Railway Labor Act does not require the parties to a "major" dispute to agree. Nor does it require the parties to agree to arbitration. The Act does require the parties to negotiate in an effort to reach agreement, but they cannot be forced into an agreement against their free will.

In as much as the procedural requirements had been complied with, the right to self-help or strike in aid of collective bargaining existed on September 25, 1956, when the Brotherhoods were enjoined ex parte without hearing.

CONCLUSION

The several Brotherhoods here involved submit that:

(1) The findings of fact of the Chancellor are not only supported by the evidence, but are founded on uncontradicted evidence, and are entitled to the same weight as a jury verdict.

(2) That the dispute between these parties was a "major" dispute as that term is used in the Railway Labor Act, for the reason that the dispute involves the negotiation of a new agreement concerning "wages and travel expenses" occasioned by the change of the customary reporting and relief point from Port Norfolk to Berkley.

(3) That as the facts clearly show the dispute is a "major" dispute, the National Railway Adjustment Board has no jurisdiction of same.

(4) That the submission made by the Carrier to the Adjustment Board is a sham and device intended to confuse the issues on appeal; that said submission is not a part of the evidence or record and cannot be considered on appeal.

(5) That the Brotherhoods have complied with all procedural requirements so that the right to self-help or strike existed when these Brotherhoods were enjoined on September 24, 1956.

Therefore, the final order of the District Court entered on February 8, 1957, dissolving the temporary injunction granted by the Circuit Court of the City of Norfolk on September 24, 1956, and further extended by order of December 20, 1956, should be affirmed, with costs to these appellees.

Respectfully submitted,

ROBERT R. MACMILLAN
Counsel for Brotherhood of Railroad Trainmen, Lodge No. 514, et als

BREEDEN, HOWARD & MacMILLAN
621 Bank of Comerce Building
Norfolk 10, Virginia

WAYLAND K. SULLIVAN, Esq.
Standard Building
Cleveland, Ohio

HAROLD C. HEISS, Esq.
Keith Building
Cleveland, Ohio

APPENDIX

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J. W. HAYES, SWORN
DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Would you state your name, please.

A. J. W. Hayes.

Q. What, if any, is your relation to the defendants here?

A. I am general chairman for the Brotherhood of Railroad Trainmen on the Seaboard Airline and Norfolk and Portsmouth Belt Line.

Q. Where do you make your home?

A. Hamlet, North Carolina.

Q. How long have you been so associated or affiliated with Lodge 514?

A. Since June '55.

Q. And were you at all times pertinent or material to the issues here involved in that capacity?

A. Yes, sir.

Q. When did you first contact the complainant as to any dispute you had with it from which this proceeding has resulted?

A. November 25th, 1955.

Q. And what was the complaint or dispute that you had with the complainant at that time?

A. The hardships that would be imposed, namely, the travel time from Port Norfolk to Berkley and the expense by way of toll, bus and so forth.

Q. And did you anticipate an answer to that letter of November 25th?

A. Yes, sir.

Q. When did you receive an answer?

A. On February 10, 1956.

Q. And how was that answer communicated to you?

A. It was handed to me by Mr. White in his office He had requested through his road foreman, Mr. Jones, the best I remember, that we meet with him in his office on that date.

Q. Who was present on February 10th?

A. Mr. White, president and general manager of the Belt Line; Mr. Jones, who I understand is road foreman and trainmaster for the carrier; and Mr. Vaughan, Mr. Mathews, and Mr. Kay, and myself.

Q. When you met at that time what, if anything, did Mr. White have to say about the proposed change from Port Norfolk to Berkley?

A. Well, Mr. White told us at the outset of this conference that it wasn't called for the purpose of negotiating an agreement to cover this change in working conditions; that it was his position that under the contract rules then existing that he was privileged to make this change.

Q. Did he offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, which at that time was 80 cents on public transportation.

Q. Is that one way or round-trip?

A. I understood that to be per day.

Q. Round-trip?

A. That would be round-trip.

Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our complaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it.

Q. Did Mr. White at that time give you any indication as to when the change might go into effect?

A. No, sir. He said it might be the next week or the following week; any time, a short while after this conference.

Q. Was there any suggestion that negotiations regarding this change in working conditions would be entered into before the change was to be made?

A. No, sir. He told us very definitely that he wouldn't entertain any conference for that purpose.

Q. What then did you do after the conference of February 10th, 1956, with Mr. White?

A. We immediately requested the Mediation Board to invoke its services.

Q. Did they invoke their services?

A. Yes, sir.

Q. And did they at that time take jurisdiction of the matter?

A. Yes, sir. As I understand it, they did. They sent a mediator in here to investigate.

Q. And the letter which we have just introduced was the letter which the board forwarded to the various defendants advising why they could not complete any hearings?

MR. WILLCOX: The letter speaks for itself. I would rather have the letter read than to have this characterization.

MR. MacMILLAN: Mr. Willcox is correct.

Q. Let me ask you this way: Is that the letter that you received from the board when they concluded jurisdiction of the matter?

A. That is right.

MR. WILLCOX: Is that the letter of March 5th, Mr. MacMillan?

THE WITNESS: That is right.

Q. Did you thereafter have occasion to again seek or accept the services of the Mediation Board, after the letter of March 5th which we have just referred to?

A. Yes, sir.

Q. What was that occasion?

A. Well, on April 26th as best I recall, bulletins were posted establishing Berkley Yard as reporting place for men in train service to be effective May 2nd, 7:00 a.m. And we set May 2nd, 7:00 a.m., as the date to withdraw the men from service, in protest to Mr. White's refusal to attempt to work out an agreement with us to cover the hardship imposed by these changes.

Q. What, if anything, did the Mediation Board do by reason of that notice of strike?

A. They took jurisdiction under emergency designated Case E-29, and, as I understand it, requested or required everybody to hold things status quo. Mr. Schoonover, mediator, was sent in to try to mediate the dispute.

Q. When did the complainant through any officer first offer to negotiate the hardship occasioned by this change?

A. It was after Mediator Schoonover conferred with both parties and told us —

MR. WILLCOX: I object to what he told.

Q. Wait a second. Was Mr. White present on that time?

A. Yes, sir.

Q. Mr. White, the present complainant?

A. Yes, sir.

Q. Who else was present?

A. Well, Mr. Vaughan, Mr. Mathews.

Q. Is that Mr. Vaughan the defendant?

A. Yes.

Q. Mr. Mathews the defendant?

A. Yes, sir.

Q. Who else?

A. Possibly Mr. Willcox. I am not sure. Maybe it was the superintendent, Mr. Burrows. But there was more than one person.

Q. Where did that occur?

A. In Mr. White's office.

MR. MacMILLAN: Just a moment. Mr. Willcox has an objection.

MR. WILLCOX: I don't object up to that point. I object to what Mr. Schoonover said.

Mr. Schoonover, your Honor, was a mediator. And all those conferences are traditionally confidential and privileged.

THE COURT: The question, if I understood it, Mr. Willcox, was what did Mr. White say or when did Mr. White first agree to negotiate.

MR. WILLCOX: If your Honor please, he has

answered that. We negotiated, the first time we negotiated — and there isn't any dispute about it — was when the Mediation Board stepped in. That is admitted. No controversy at all. Now, he has asked this witness to say what Mr. Schoonover said to Mr. White in these negotiations. For the reasons I have said and for the reasons I stated in my written motion, the testimony is inadmissible. In addition to that, Mr. Schoonover had no authority to decide any issue, and nothing he has said or decided or nothing he directed to do was effective or in any way effective as to the rights of the parties.

MR. MacMILLAN: Your Honor, he is exactly correct and to prevent any possibility of error in the matter, we are willing to withdraw anything that Mr. Schooner said in view of his admission that that was when he first negotiated, is when Mr. Schoonover entered the picture.

MR. WILLCOX: Mr. MacMillan, that is alleged in the pleadings. There has never been any question whatever about it.

MR. MacMILLAN: Your Honor, that is why we have put this witness on this morning, to attempt to clear up when negotiations began. There was some intimation in Mr. White's testimony that he was willing to negotiate this matter from the beginning. We are now attempting to contradict him on that score and to show no negotiations started until Mr. Schoonover entered the picture.

THE COURT: Of course, the fact no negotiation commenced until Mr. Schoonover entered the picture

would not necessarily conclude that Mr. White, president of the railroad carrier, would not have been willing to have negotiated, although Mr. Hayes has definitely stated that at the time of the first conference on or about February 10, 1956, that Mr. White refused to negotiate.

MR. MacMILLAN: We withdraw any question as to what Mr. Schoonover said because we concede it is not material. It is not binding on the complainant.

Q. What did you then negotiate with the complainant and the defendant? I am not asking you details or terms. What were the items in dispute?

A. The travel time from Port Norfolk to Berkley and the expense, transportation expense.

Q. Did Mediator Schoonover stay in the picture the entire period of mediation?

A. No, sir. Mr. White requested that the mediation proceedings be recessed for the purpose of getting authority, as I understand it, from the powers that be, the Belt Line Railroad to go into it further.

Q. I show you a letter, which I have already shown to Mr. Willcox, dated May 2nd, 1956. It is from Mr. White to Mediator Schoonover. I ask you if that is the letter which was written requesting a recess in mediation.

A. That is right. That is it.

MR. WILLCOX: If your Honor please, two letters have been introduced this morning and examination is being made in accordance with them. I suggest that it would be appropriate if Mr. MacMillan would

read them now so your Honor would know what we are talking about; unless your Honor has already read them.

THE COURT: The Defendant's Exhibit No. 2, which is a letter from the National Mediation Board to Mr. White and to various members of the Brotherhood, dated March 5th, 1956, I have glanced through, Mr. Willcox, at the time that it was handed to me. The general effect of that is the Executive Secretary of the National Mediation Board stated that the carrier had not moved the terminal from Port Norfolk to Berkley as was stated in the application; and apparently that they at that time refused to do anything further in the matter officially.

I don't know anything about the other letter Mr. MacMillan has reference to.

MR. MacMILLAN: If we might introduce this, your Honor, I will read it to the Court.

THE COURT: Defendant's Exhibit No. 3.

(Received in evidence and marked Defendant's Exhibit No. 3.)

(Mr. MacMillan then read to the Court Defendant's Exhibit No. 3.)

Q. How long did mediation continue and what mediators worked on this matter?

A. Well, it was recessed for several days there. Then Mr. Roadley, he was sent in.

Q. Continue and tell us the details, Mr. Hayes. Just tell us how long he stayed and how long you mediated to the best of your knowledge.

A. The best I remember, he stayed here three days and we passed proposals, I'd say, back and forth, through the mediator with Mr. White.

Q. Who represented the complainant throughout the course of mediation? Who was actually present during mediation?

A. I was there.

Q. The complanant? Who represented the complainant?

A. Oh, Mr. White, and Mr. Burrows and Mr. Willcox.

Q. And was any offer made of arbitration during mediation?

MR. WILLCOX: I object, if your Honor please. Totally immaterial, irrelevant.

THE COURT: The details of the offer would definitely be properly eliminated. But all Mr. MacMillan wants to know is whether any offer was made.

MR. WILLCOX: That is what we contend is inadmissible.

THE COURT: Isn't it a part of the negotiation? He has stated that proposals were passed back and forth. Now, I assume that no offer was ever accepted and that is the reason why the parties are here today.

MR. WILLCOX: That is correct, your Honor. It has been the position of the Belt Line from beginning to end that under the existing rules, which is a part of the bargaining contract, it had a right to make this change. On the other hand, the Brotherhoods have con-

tended that we did not have the right to make it, that that rule does not give us the authority and we can only make it as a result of negotiating with them. And that has been the issue throughout the entire thing.

THE COURT: I don't see how this question could hurt anybody. It is a yes or no question: were any offers made during the course of the negotiation. He doesn't have to say who the offers were made by. He doesn't have to say whether they were accepted. Just want a yes or no answer.

MR. MacMILLAN: Your Honor, I would like to state the reason for that question because I believe it is material. In order to obtain an injunction in this matter the complainant will have to show that it has exhausted the remedies available to it under the Railway Labor Act and to any administrative remedies it had. We will at the proper time urge that arbitration is one of the remedies which the complainant should have pursued at the time prior to maintaining an injunction to enjoin strike. We feel it is pertinent and we feel very strongly that we should be permitted to show what the evidence would show on that issue.

THE COURT: Offers?

MR. MacMILLAN: Not the contents of the offers, but where they originated from, and where any offer of arbitration originated from the complainant, which we feel to be more important than the arbitration offers that might have originated from the defendant.

THE COURT: Well, this gentleman has already testified, and I think Mr. White testified the other day, that proposals went back and forth between

the Brotherhood and the carrier through the mediator. If proposals went back and forward, I think the Court has a right to assume that no proposal was accepted. What difference does it make whether an offer went from the carrier to the Brotherhood? Same is a proposal, isn't it?

MR. MacMILLAN: Yes, sir, except that the law says that under the Railway Labor Ast you must exhaust the remedies available to you under the Act before you can proceed to get an injunction. And one of the remedies available to the complainant was arbitration. The president testified at the first day of hearing that no offer of arbitration was ever made. Now we want to show that offer of arbitration was made by the defendants.

THE COURT: Yes, I think it would be admissible as to that, Mr. Willcox.

MR. MacMILLAN: We offer it for no other purpose.

THE COURT: Didn't Mr. White testify the other evening that no offer of arbitration had been made?

MR. WILLCOX: I do not recall that he did, sir. My memory — I won't make the categorical statement that he did not; but I don't recall it.

THE COURT: I am sorry, gentlemen, my notes of the previous day's hearing are not before me at the present time and, of course, we can't go into the record. I have some faint recollection.

MR. MacMILLAN: My recollection is positive,

your Honor, because it was one of the questions I had down to ask Mr. White.

THE COURT: I will permit the question.

MR. WILLCOX: Save the point.

Q. (By Mr. MacMillan) Did the complainant at any time offer to arbitrate this dispute?

A. Not that I recall.

Q. Did you at any time offer to arbitrate this dispute or any phase thereof?

A. We offered —

MR. WILLCOX: Same objection.

A. — to arbitrate the matter of time involved and accept the transportation offered by Mr. White.

Q. To whom did you convey that offer to the complainant?

A. Mr. Roadley, the mediator.

Q. Do you know whether or not Mr. Roadley ever communicated that offer to the complainant?

A. I do not.

MR. WILLCOX: Now, if your Honor please, I move that it be striken out because it doesn't appear he ever communicated it to the complainant.

MR. MacMILLAN: We have no objection to that.

THE COURT: All right. Strike it out.

Q. After negotiations terminated with the mediator in Norfolk, Virginia, did you ever have occasion or did the

defendants ever have occasion to have any further negotiations during mediation?

A. Yes, sir, in Washington before a member of the Mediation Board.

Q. And tell the Court what occurred at that time.

Well, at that time we — I believe it was July 23rd — in Washington. The mediator met with us and then he would meet with Mr. White, and he finally made a proposal, Mr. Edwards of the Mediation Board, to us.

MR. WILLCOX: If your Honor please, that brings up admission of evidence, the same question that I put in my written motion to strike part of the answer.

THE COURT: Mr. White wasn't there, was he?

THE WITNESS: Yes, sir. He was in Washington.

THE COURT: I know he was in Washington, but was he present?

THE WITNESS: Yes, sir; all of us were present when the mediator made the proposal.

THE COURT: I am not interested in the details of the proposal.

MR. WILLCOX: He made a proposal. It is the details I am objecting to, your Honor.

Q. (By Mr. MacMillan) Who was present on July 23rd, 1956, in presence of the member of the National Mediation Board?

A. Mr. White, Mr. Willcox, Mr. Burrows, Mr. Vaughan, Mr. Bowen, Mr. Mathews, and myself and Mr. Jenkins, Mr. Millett, and Mr. Turner.

Q. You say a proposal came from the mediator, is that correct?

A. That is right, sir.

Q. Did you all negotiate on that proposal with the complainant?

A. Yes, sir. We talked about the wording of the agreement, of the proposal, and the different things that were included in it.

Q. After all the corrections had been made in the wording, what, if any, suggestion was made as to signing the agreement?

A. By the Mediation Board?

Q. By anyone present.

MR. WILLCOX: Your Honor, I object to that. Going into the details of negotiation and mediation. Regardless of what suggestion was made by anybody as to signing it, it doesn't affect this situation or the merits of this case in any way, shape or form.

THE COURT: Mr. MacMillan, bearing in mind that you have steadfastly throughout the hearing, at least passively, agreed that the details of these so-called negotiations were not pertinent, and in no way binding, what difference does it make as to what the mediator may have suggested as to the signing of any proposal?

MR. MacMILLAN: We are now directing our attention, your Honor, against the portions of the complaint and the portions of the answer which have been denied, which deal with the question of whether these defendants have bargained in good faith, have been

attempting in every way to dispose through negotiation of every dispute they have with the complainant. We intend to show that at this last negotiation, as we have alleged in our answer, that the complainant did not bargain in good faith and at a point when the parties had gotten down to a point of agreement the parties left the negotiating room, on the guise that they had to catch a boat, and left the city. We intend also to prove that which has been denied, that an agreement was entered into — not entered into, a proposal was prepared, signed by the parties and by the mediator. Now, that agreement consists of two parts: first, the cover of agreement, and second, the attached details of the agreement, setting forth the details. We do not offer or propose to offer over Mr. Willcox's suggestion any of the details of the agreement. We do submit that the cover page which shows how far the parties went to settle this dispute is admissible. And that is what we are now aiming at.

THE COURT: Well, Mr. White testified that this so-called written proposal was prepared by Mediator Edwards himself without any prior lengthy discussions with the parties and that he thereafter, I think, either sent it to the union or the Brotherhood members signed it perhaps there, and it was sent to the railroad. They did leave. I don't follow you exactly as to what the benefit that would be. A mediator makes a proposal, which may have been a portion of his own brainstorm or it may have been derived, as it undoubtedly was derived, after some discussion with the various parties. But in any event, the mediator comes forward and says,

"This is my idea of a good way to settle this whole controversy." So he puts it in writing. Now, is it lack of good faith on the part of the carrier if they refuse to sign that?

MR. MacMILLAN: No, sir. What the evidence that we are developing here is that the mediator came forward with the proposal. The proposal was then negotiated, the whole afternoon or most of the afternoon of July 23rd. After the parties had made correction in the language, back and forth between themselves, and there was a need to go forward and either sign it or to have further negotiation if necessary to come to a further agreement, the parties having been there only one day, the complainant then advises the mediator that it must catch a boat and leave the city, and the defendants proceeding in good faith stay on until the agreement as negotiated is prepared, sign the same, the mediator signs the same, and it is sent on to the complainant for signature and it is rejected. We submit that nothing in there binds the complainant, except it is admissible evidence to show how far the parties went to complete every requirement that they negotiate as a prerequisite of following their common law remedies.

THE COURT: Suppose that Mr. White, Mr. Willcox and Mr. Burrows and everyone else connected with the carrier had stayed over in Washington that night, all that night, sat up all night long, and then rejected it. What difference does it make from the fact it was subsequently mailed to them and they rejected it?

MR. MacMILLAN: There is a strong showing if they had stayed over and negotiated, — going further,

if they had complaints that they were negotiating in good faith, their leparture right at the time the parties were approaching a settlement, we submit, is evidence that they were bargaining in bad faith.

THE COURT: There is no indication yet. They did discuss these various proposals. But is there any indication, that standing alone, that their failure to stay on all night long? Who could testify — could Mr. Hayes testify that if they had stayed on two hours more they would have reached an agreement?

MR. MacMILLAN: No, sir, he cannot.

THE COURT: Who can testify?

MR. MacMILLAN: No one can, except their departure at a time when they had been called before the board to settle this dispute is evidence that they were not bargaining in good faith.

THE COURT: I don't agree with you. After all, they could have come back the next day or two days later if the mediator had said "Let's adjourn until such and such a day." If you want to put in evidence the mediator then requested the carrier's officials to come back two days later and they said, "No, we are not coming back." But the mere fact they said, "We have got to leave, we have got to catch a boat to go to Norfolk," I couldn't possibly say that that is evidence of bad faith, just because someone is going to leave to catch a boat to go to Norfolk — any more than Mr. Willcox very vigorously opposed my night session the other night, and still does vigorously oppose it.

But I don't see where that is evidence of bad faith

in and of itself at all. I think you have effectively shown that there was considerable negotiation on these proposals, whatever the proposals may have been. If thereafter, when the railroad wrote a letter up there and said "We decline to go into this proposal" or "We reject it," there had been further evidence of efforts to get them together and they arbitrarily refused, why, that might have been some evidence there of failure to bargain. But I think you have effectively shown what you want to show and that is that there were negotiations between the parties looking toward a settlement of the controversy.

MR. MacMILLAN: Yes, sir, and we submit that we would like to offer in evidence at this time the proposal signed by the member of the National Mediation Board and the parties which showed that that was the ultimate that they could do to settle this dispute. We feel that it is evidence of that and should be admitted.

THE COURT: Let it be marked Defendant's Exhibit No. 4 refused.

(Marked Defendant's Exhibit No. 4 refused.)

MR. WILLCOX: Refused?

THE COURT: Yes.

Q (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complainant over his right to move the place of reporting and relief from Port Norfolk Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management.

Q. Why did the defendants schedule the strike which was called both on May 2nd, 1956, and September 26, 1956, for the same hour which the carrier had scheduled the move from Port Norfolk to Berkley?

A. Well, that was the date and time that these hardships would have been imposed by this change on the men and an agreement had not been worked out to take care of this one hour travel time in each direction and this expense involved which we considered hardship.

Q. Do the members of your lodge want to go to Berkley without an agreement covering these working conditions?

A. No, sir, not without an agreement to cover it.

Q. Are they working against their will in Berkley today?

A. Well, they are, I'd say, and will be until an agreement is worked out to cover these hardships that are being imposed on them, yes, sir.

MR. MacMILLAN: Judge, there have been introduced three letters. Mr. White has admitted the letters and we have admitted the letters. They are set forth in full in the answer and I believe some of them appear in Mr. Willcox's complaint. Would that be sufficient for the Court to have those letters available to it, or do you want us to introduce the originals?

MR. WILLCOX: Which letters are you speaking of?

MR. MacMILLAN: From the defendants to the complainant under date of November 25, 1955.

THE COURT: That is set forth in the answer under paragraph 11 (a).

MR. MacMILLAN: The second letter is February 10th, 1956, which is a letter from Mr. White to the various defendants.

THE COURT: That is set forth in the answer under paragraph 11 (b).

MR. MacMILLAN: And the third letter is the letter of February 13, 1956, from the defendants to the complainant, Mr. White.

THE COURT: And that is set forth in defendants' answer under paragraph 11 (c).

Those are the only letters. There is no objection to those as such?

MR. WILLCOX: No, sir. I think we stipulated.

MR. MacMILLAN: I wanted to make it clear that I wasn't going to offer the letters; that the letters as set forth in the answer would be proof.

THE COURT: Let the record so indicate.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norolk to Berkley?

A. I don't know that I understand your question, Mr. Willcox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir.

Q You speak of an hour's time in each direction. You know how far it is from Port Norfolk to Berkley Yard?

A. Well, that depends on the way you go, sir.

Q. Take the most direct route through the tunnel and into Berkley.

A. The best I recall, we have it here in this file, something around —

Q. Four and a half miles, isn't it?

A. The most direct route, around five miles.

MR. MacMILLAN: I might help, Mr. Willcox. We have not taken issue with the testimony of Mr. Bowen, I believe the name was, as to the distances and expenses involved.

I will tell Mr. Willcox in advance, we will offer a witness who will prove the time and expense involved to go by public conveyance, which Mr. Bowen omitted. But other than that, we have no objection to their testimony.

Q. (By Mr. Willcox) Mr. Hayes, it doesn't take an hour to go from Port Norfolk to Berkley Yard, does it, by either route, unless you go around the toll free route?

A. Mr. Vaughan, of our organization —

Q. I am not talking about Mr. Vaughan. I am talking of your own knowledge.

A. Well, I never have been over there, Mr. Willcox. Mr. Vaughan has timed it. He can answer the question.

Q. Let's talk about the modus operandi of the mediation. Is it not a fact that when the mediator, Schoonover came down here that we all met in the terminal building at the Union Station and that you and your associates were in one room, Mr. White and Mr. Burrows and I were in another?

A. Part of the time, that was the case.

Q. And Mr. Schoonover went in and talked to you in our absence?

A. That is right.

Q. And then he came in and talked to us in your absence?

A. That is right. And then we all talked.

Q. And then at least once and possibly [illegible] together and had a general discussion?

A. That is right.

Q. Now, when we went to Washington you were there, weren't you?

A. That is right.

Q. And most of us or several of us met outside the building and went in the building together; that is correct, isn't it?

A. Yes, sir, to begin with.

Q. To begin with. And then they separated us. They put the Brotherhoods in one room and put us in another?

A. That is true.

Q. And Mr. Edwards went backwards and forwards?

A. Yes, sir.

Q. And we, of course, don't know what he said to you all and you, of course, don't know what he said to us?

A. No.

Q. And the only time we got together was late in the afternoon?

A. That is right. It was at the time he made the proposal to all of us.

Q. And that was the only time that we got together there?

A. Yes, sir.

Q. You speak of the hardships. Some of the employees, most of them I believe, live in Portsmouth, do they not?

A. A good many of them, yes, sir.

Q. Some live in Norfolk?

A. Some, yes, sir.

Q. And some live in Berkley or South Norfolk?

A. I couldn't testify to that.

Q. Well, assume that to be a fact. Going to Berkley Yard is no hardship on those people, is it?

A. Not those few that live in that community.

Q. And it's no hardship on those that live in Norfolk, is it, as against Port Norfolk?

A. No, sir.

Q. And under the agreements and the working rules of the Brotherhood, men have a right to bid on jobs according to their seniority?

A. That is right. May I qualify that last answer?

Q. Yes, sir.

A. By saying that in this proposed agreement, and in our negotiations, we agreed that these men that live —

Q. One minute now.

MR. WILLCOX: If your Honor please —

MR. MacMILLAN: Your Honor, he has gone into it and this witness has a right to tell him what the truthful part of the negotiations were and why the questions which he was asked are irrelevant.

MR. WILLCOX: If your Honor please, I did not ask the question. It is not responsive to the question. He said he wanted to qualify it and is going into the details of the negotiations which your Honor said are ruled out.

THE COURT: I don't want any details of the proposals, Mr. Hayes.

MR. MacMILLAN: Judge, may I point out something here, to show you how material his answer was. He was asked whether it would be a hardship on men living in South Norfolk, Norfolk, Portsmouth. His answer was no. He then led him into a statement which was not a hardship therefore on the defendants. Mr. Hayes was pointing out that the negotiations didn't revolve about the men in Norfolk, Portsmouth, or South Norfolk. The negotiations dealt only with the men in Port Norfolk where the hardship existed.

THE COURT: I understand either from your opening statement or from Mr. Willcox's opening statement, or perhaps from the evidence somewhere, that the only complaint, if you want to refer to it as a complaint, is with respect to the travel time and the expense involved of the men who were living in the Port Norfolk area and were required to previously report to Port Norfolk and are now being required to report to Berkley.

MR. WILLCOX: If your Honor please, your Honor and I are not quite in agreement as to the purposes of the negotiation. The dispute is as to the hardship, as he calls it, of going from Port Norfolk to Berkley. But I don't want your Honor to rest under the impression that the demands have been limited to the people who are going to Portsmouth.

THE COURT: Do you want to go into that?

MR. WILLCOX: No, sir, I do not. But I don't want your Honor to assume that.

THE COURT: I can't assume anything else. I don't know who else would be affected.

THE WITNESS: That is right.

MR. WILLCOX: Well, if your Honor please, then if your Honor is going to assume that they were dealing only with the men who live in Portsmouth, we will have to go into it, because actually they said it applied to every man in the first instance. Now, in the last negotiation they got away from that, it is true.

THE COURT: I don't know. You have zealously protected all evidence of these negotiations through the mediator

MR. WILLCOX: Exactly, sir.

THE COURT: I can't presume what they are.

MR. WILLCOX: That is my only question now. But your Honor said you would assume.

THE COURT: I could only assume, from the evidence thus far presented, that the complaint has been with respect to these Port Norfolk men who the

Brotherhood contends by reason of a changed working condition are now required to take more travel time, for which presumably they do not get paid, and more travel expense by reason of toll routes in reporting to Berkley. Now, I don't know how a man who lives in Berkley within one block of the Berkley Yard could have a complaint.

MR. WILLCOX: If your Honor please, what I am disturbed about is your Honor's assumption, because —

THE COURT: What else am I going to assume?

MR. WILLCOX: You assume what the facts show: That this plan was to abolish certain trains, or crews as they are called, that were operating out of Port Norfolk and in lieu thereof to start operating trains out of Berkley Yard. And the answer is that they have been reporting at Port Norfolk since 1897 and they don't want to go to Berkley without negotiations. The assumption about residence — there is nothing in the evidence about residence.

THE COURT: Mr. Burrows testified I believe the other night that there were some people who lived over here at Norfolk who reported to Port Norfolk.

MR. WILLCOX: Correct.

THE COURT: I agree with you there. Now, I don't see how those men could be adversely affected. If they live in Norfolk and have to report in Port Norfolk — rather than reporting there they are reporting to Berkley, if anything, I would think that would be easier on them by reason of my knowledge of the general area. But he did testify, as I recall — I don't have

my notes but I have it in my notes in my office — as I recall, Mr. Burrows said there were eight men that lived in Norfolk who reported at Port Norfolk. I may be incorrect.

MR. WILLCOX: Your Honor is absolutely correct, sir, and eight who live in Portsmouth that report at Sewells Point.

THE COURT: And eight who live in Portsmouth who report at Sewells Point. Now, perhaps I didn't word myself correctly. I meant to convey the impression that I didn't see how anybody could be adversely affected excepting those men who lived in the Port Norfolk area.

MR. WILLCOX: All right, sir.

THE COURT: That is what I intended to convey.

MR. WILLCOX: All right, sir. Then I am through with that subject.

Q. (By Mr. Willcox) Mr. Hayes, have you with you the copy of the telegram that you sent to the Mediation Board in February?

A. I will have to check this file; if you will bear with me.

Q. When this matter was first reported to them. February 13th I think is the date of it.

A. Yes, sir, I have a copy of it here.

Q. Will you read it.

A. Addressed to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C. says: "Serious situation existing on Norfolk Portsmouth Belt Line Railroad

as the result of management arbitrarily moving the terminal from Port Norfolk to Berkley, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Q. That is the telegram that you sent?

A. That is the telegram that was sent, yes, sir.

Q. Mr. Hayes, since this move has been made, has any member of the Brotherhood of which you are the general chairman filed a time claim for the time involved in going to Berkley Yard or for the expense incurred?

A. No, sir. We don't have a rule to cover it. We haven't been able to negotiate an agreement to cover that.

Q. None has filed a claim?

A. None has reached me.

Q. Has any member of the Brotherhood with which you are connected filed any claims of any kind growing out of the move since the move was made?

A. Not to my knowledge, Mr. Willcox. When we make claims we have to have a contract rule to base them on and we don't have any covering this situation.

Q. Do you mean to say that you have no contract rule that would entitle the men to claim extra pay for the time involved?

A. No, sir. That is what we were trying to negotiate, a rule to cover this particular move here and hardship that was imposed.

Q. Let me be sure that I get you right. I don't want to be confused myself. As I understand you now, you admit that there is no rule in force on which you could base a claim, on which the employees could base a claim for compensation during the time consumed in travel from Port Norfolk to Berkley and return?

MR. MacMILLAN: Mr. Willcox, we have admitted that in the answer.

A. We have said that, yes, sir. That is the truth.

Q. And what you want to do is to negotiate a contract or a rule which will entitle you to that?

A. That is the truth, yes, sir. And as stated to you and to Mr. White in conferences, we feel that it is incumbent upon the railroad to serve notice under the Railway Labor Act when they intend making such change.

Q. We understand that. That is your contention. Now, what is the time limit in which a trainman can put in a time claim after he has done the work?

A. I think it's 60 days — 45 — 60; under the agreement.

MR. WILLCOX: That is all, Mr. Hayes.

C. W. MATHEWS, SWORN

DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Will you state your name, please?

A. C. W. Mathews.

Q. Where do you live, Mr. Mathews?

A. Norfolk.

Q. What is your relationship to the defendant Lodge 76?

A. General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Q. How long have you been General Chairman?

A. Twenty-eight years.

Q. Were you General Chairman in 1941 and '42?

A. I was.

Q. Were you General Chairman when the complainant moved the place of reporting and relief from Port Norfolk to Money Point?

A. I was.

Q. What, if anything, did the Brotherhood do at that time as to filing time claims?

A. The men filed claims and we progressed those claims to and through the highest operating officer on the Belt Line Railroad.

Q. What, if anything, was done in regard to those claims thereafter?

A. We found that the National Railroad Adjustment Board didn't have jurisdiction.

MR. WILLCOX: If your Honor please, that is a question of law. We don't consider ourselves bound by it.

MR. MacMILLAN: We don't say that you are bound by it. We are just saying that that is what occurred.

Q. What then thereafter occurred to those claims?

A. Well, they abolished Money Point thereafter.

Q. You say you found the Adjustment Board did not have jurisdiction?

MR. WILLCOX: If your Honor please, I object to the question. I move his last statement on that be stricken out because it is a question of law whether the board has jurisdiction or not.

THE COURT: One of the main objections is that Mr. MacMillan is trying to prove a fact. Now, if he is trying to prove a fact there ought to be something of record of that. You can't just let Mr. Mathews testify what the board did as a factual situation.

MR. MacMILLAN: We are not offering his testimony, your Honor, as to jurisdiction of the board. We are asking him the reason why the claims were not processed.

THE COURT: How does he know?

MR. MacMILLAN: He has given the reason why they abandoned them at that time as a matter of fact.

THE COURT: How does he know that?

MR. MacMILLAN: He is not asserting that he knows that. He is giving that as the reason, whether the reason was right or wrong.

THE COURT: His reason?

MR. MacMILLAN: I asked him why the claims were not processed. And he is saying.

THE COURT: You mean that he, Mr. Mathews, because he reached the conclusion that the board did not have jurisdiction?

MR. MacMILLAN: That is correct.

THE COURT: Oh, well. I think that is admissible, Mr. Willcox.

MR. WILLCOX: All right, sir.

Q. (By Mr. MacMillan) Did you so advise the complainant as to why you were withdrawing those claims or why you were not processing those claims to the board?

A. Yes, sir, we did.

Q. Who did you advise?

A. Mr. H. L. White.

Q. What was his capacity with the complainant at that time?

A. Vice-president and general manager.

Q. Where did you so advise him?

A. In the board room in the Union Station in Norfolk.

Q. Who was present at that time?

A. Mr. Hedges and Mr. Lavine, Mr. Early, Mr. Crawford and myself.

Q. Did you advise him that it was a negotiable matter?

A. We did.

Q. And what occurred thereafter as to the Money Point place of reporting and relief?

A. Well, they abolished the Money Point and the operation was carried back to Port Norfolk and we were under pay until the time we got back to Port Norfolk and also transported by the company's conveyance, station wagon.

(The answer was read by the reporter.)

MR. WILLCOX: Underpaid?

THE WITNESS: I said we were under pay. We were paid from the time we left Port Norfolk until we were relieved at Port Norfolk.

Q. How long was the Money Point operation maintained?

A. I would say approximately nine or ten months.

Q. Has it been the practice of the carrier to pay men and transport them on company time from Port Norfolk to Berkley?

A. Yes, sir.

Q. I mean prior to this dispute?

A. Yes, sir.

Q. Would the members of your lodge be working in Berkley if it were not for the injunction that has been entered in this Court?

A. No, sir. The members, they voted 100 per cent to strike the carrier unless it gave them a working agreement or working conditions according to the change.

THE COURT: I don't understand this Court entered the injunction.

MR. MacMILLAN: If I said that, I was in error, your Honor.

THE COURT: I just want to get the facts right.

Q. Are the men working in Berkley against their will?

A. Yes, sir, I would say they are.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Mathews, I understood you to say the last that you were paid — I am speaking now of the 1941 job when you were at Money Point — for time from Port Norfolk to Money Point and return?

A. No, that was the dispute, Mr. Willcox. We were after an agreement for the pay, transportation and time consumed traveling to and from Berkley.

Q. You were not paid then?

A. No, sir.

Q. And you put in claims?

A. Yes, sir.

Q. And did not progress them beyond the company-

A. We didn't.

MR. MacMILLAN: Mr. Willcox, his question was directed what did the company do after they abandoned Money Point and he said at that time they were paid.

MR. WILLCOX: I understand him.

THE WITNESS: I said after they abandoned, the operation was carried back to Port Norfolk and we were placed first in taxicabs and then station wagons and carried over there and our time began when we reported at Port Norfolk and ended when we relieved at Port Norfolk.

Q. You are talking now about the footboard relief down at the fertilizer section?

A. That is right; Money Point.

Q. And also the footboard relief at the Ford plant?

A. That is correct.

Q. And those are the two times you are talking about. You say the men are working in Berkley against their will?

A. I'd say yes.

Q. Does that apply to those who live in Norfolk too?

A. Well, Mr. Hayes, I think he cleared that. I don't know about the ones that live in Norfolk.

Q. Does it apply to the ones that live in Berkley?

A. I guess it would apply to all. I don't know. I couldn't express the men's opinion, Mr. Willcox. I don't know.

Q. What objection can a man who lives in Norfolk have to reporting to Berkley Yard rather than to Portsmouth?

A. We took that into account. And the men in Norfolk are not involved.

Q. That isn't the question I asked you. What objection could a man who lives in Norfolk have to reporting to Berkley Yard instead of to Port Norfolk?

A. Well, I don't know. Of course, I can only speak for myself.

Q. It would be easier to get to Berkley, wouldn't it?

A. Absolutely. For me, it would.

Q. Easier and cheaper?

A. That is right.

Q. And you live in Norfolk?

A. That is right.

Q. And the same thing is obviously true of those who live in Berkley. And if nobody else wants those jobs the men who live in Norfolk and are now reporting to Port Norfolk could bid them in?

A. Anyone who has seniority can bid on any job.

MR. WILLCOX: That is all.

FOY K. VAUGHAN, SWORN

DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Tell his Honor your name, please.

A. Foy K. Vaughan.

Q. And where do you live?

A. 313 Chautauqua Avenue in Portsmouth, Virginia.

Q. What is your relation to the defendant Lodge 514?

A. Local chairman.

Q. How long have you been local chairman?

A. Approximately nine years.

Q. Mr. Vaughan, have you had an opportunity to make an investigation of the time and expense involved to go by public conveyance from Port Norfolk to Berkley Yard?

A. Yes, sir, I have.

Q. First let me ask you what time it takes to go from Port Norfolk to Berkley by public conveyance.

A. It took me one hour and four minutes.

Q. What public conveyance did you use?

A. I used bus; bus through the tunnel and South Norfolk bus on the Norfolk side.

Q. What, if any, lay-overs did you have in going from Port Norfolk to Berkley? How many busses did you have to catch?

A. Three.

Q. And how far did the last bus place you from the point of reporting?

A. Approximately a half a mile.

Q. What expense was involved in going by public conveyance from Port Norfolk to Berkley?

A. Forty cents each way at that particular time; and it is forty-two now, the fare being increased two cents in Portsmouth.

Q. So the total expense is 84 cents, is that correct?

A. Yes, sir.

Q. Did you also measure the time it took you to go by public conveyance from Berkley to Port Norfolk?

A. That morning, yes, sir; on return.

Q. From Berkley to Port Norfolk, how long did that take?

A. It took me exactly one hour in return to Port Norfolk.

Q. Did you have opportunity to go any other time during the day to determine whether it would take any longer?

A. Yes, sir, I left Port Norfolk at 1:20 and returned to Berkley by the same route.

Q. Did you find any time variance during various times of the day?

A. Yes, sir; it took me one hour and twelve minutes, going back to Berkley in the afternoon leaving Port Norfolk at 1:30.

Q. What time did you find it took you to go from Berkley to Port Norfolk?

A. Excuse me just a minute. I left Berkley at 2:40, the yard office at 2:40, and returned to Port Norfolk and it took me one hour and twenty minutes.

Q. So what is your overall travel time by public conveyance from Port Norfolk to Berkley and Berkley to Port Norfolk?

A. Judging from the connections that I made in these tours that I made, I would say from approximately two hours and twenty minutes would be an average.

Q. Has the carrier prior to the arising of this dispute ever furnished transportation and travel time from Port Norfolk to Berkley for members of your lodge or you personally?

A. Yes, sir.

Q. And has that been the practice prior to this dispute?

A. Whenever they had an engine in Berkley that they wanted to be relieved without sending the engine to Port Norfolk, yes, sir.

Q. Would the members of your lodge be working in

Berkley if it were not for the injunction entered in this cause?

A. No, sir.

Q. Are the men being worked in Berkley against their will at this time?

A. I would say yes, sir.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. You talked to all of them, Mr. Vaughan?

A. Mr. Willcox, I talked to every man and every man had an opportunity to —

Q. Wait a minute now. My question: You have talked to all of them?

A. Well, I would say yes, sir, the biggest proportion of them.

Q. Have you talked to those men who lived in Berkley

A. Yes, sir.

Q. Haven't they said they wanted the jobs?

A. No, sir.

Q. Are you sure of that?

A. That had an opportunity to bid for them.

Q. I understand. But didn't they fail to bid because of the strike vote?

A. I wouldn't say that.

Q. You mean to say the man who lives in Berkley would rather go to Port Norfolk and report than go to Berkley Yard?

A. No, sir, I don't mean that, Mr. Willcox.

Q. I didn't think you did.

A. No, I don't mean that.

Q. You say the company has furnished transportation to Berkley. Those have been the instances of the footboard relief at the Ford plant?

A. No, sir.

Q. They don't do it there?

A. Oh, they do it there.

Q. And they have done it at Money Point?

A. Yes.

Q. And sometimes they have an emergency and they have to send a crew over there and they do it then?

A. In Berkley Yard, yes, sir.

Q. But they don't do it regularly because they don't transport crews regularly except the Ford plant and the Money Point plant?

A. That is right.

Q. Mr. Vaughan, have you tested the time in an automobile?

A. Yes, sir.

Q. How long did it take you?

A. Excuse me and let me get my notes correct here.

Mr. Willcox, my figures vary a little from Mr. Bowen. I took my automobile and set the trip mileage on the speedometer and left from the Port Norfolk Yard office and went the toll free route and the distince was eleven and a half miles by the speedometer.

Q. That is the longest way you can possibly go?

A. That is right.

Q. Isn't it?

A. That is right. I left at 8:10, when there wasn't any traffic because I wanted the benefit of the doubt when I made the trip and it took me thirty minutes.

Q. Have you tried it by going through Western Branch Road and down County Street and through the tunnel?

A. No, sir.

Q. You haven't tested that?

A. No, sir.

Q. And that is the most direct route?

A. And the most expensive.

Q. And most direct?

A. Yes, sir.

Q. Have you tried it over Jordan's Bridge?

A. Yes, sir, on the same date.

Q. How long did that take you?

A. I left the yard office at 8:15 and arrived at Port Norfolk Yard office at 8:35 p.m. and by car, setting the speedometer, checked five and seven-tenths miles.

Q. That was twenty minutes?

A. Twenty minutes. No traffic.

Q. That is longer than the toll route?

A. You mean the toll free route?

Q Than the tunnel route. From Port Norfolk via the Jordan Bridge is longer than going through the tunnel to Berkley?

A. Oh, yes.

Q. As a matter of fact, do not a great many of the men go to work in automobiles?

A. I would say yes, sir.

Q. And do they not have pooling arrangements whereby a crew will ride with one member of the crew?

A. Now, I can't testify to that.

Q. Don't you know that some of them do, Mr. Vaughan?

A. I wouldn't testify to it because I haven't been to Berkley. I haven't been over since the crews have been going over.

Q. I am talking about even to Port Norfolk, a lot of them come there, don't they?

A. Not that I know of.

Q. A lot of them go to Sewells Point that way?

A. We did during World War II.

Q. Don't you now? Don't the men now who work at Sewells Point get together and ride in one automobile?

A. I couldn't testify that and tell the truth because I haven't seen it going on in the office I work on the railroad.

Q. You haven't?

A. I stated we did do it during World War II to save gas and all.

Q. You know the space over there at Port Norfolk where the crews have been reporting, don't you?

A. That is right.

Q. And that is filled with automobiles all the time, isn't it?

A. That is right.

Q. Have you ever worked the Sewells Point job?

A. Yes, sir.

Q. Didn't you go down in your automobile?

A. Yes, sir.

Q. Didn't some of the trainmen ask you to take them with them?

A. No, sir.

Q. Did you take any with you?

A. No, sir, not the last few times I have been down there.

Q. I am not talking about the last two times.

A. I just testified that during World War II we pooled our cars to try to save time. We had a limit on gas.

Q. Now you all go in separate cars?

A. Mr. Willcox, to answer that question, fortunately I have been on the railroad and have seniority enough living in Portsmouth that I didn't have to go to Sewells Point unless I caught an emergency job. When I did I drove my car and no one rode with me.

THE COURT: When you spoke of the most expensive route being through the tunnel, you meant I take it from the standpoint of the payment of tolls, did you not, Mr. Vaughan?

THE WITNESS: Yes, sir.

THE COURT: You have not considered, of course, the total overall cost of operating a person's vehicle from the standpoint of gas and depreciation?

THE WITNESS: That is right, sir.

MR. WILLCOX: If your Honor please, maybe better put that in the record.

Q. The toll fare on the tunnel, Mr. Vaughan, is 30 cents for a car and driver and 5 cents for each additional passenger?

A. Yes, sir.

Q. On the Jordan Bridge I believe the round-trip fare is 35 cents?

A. For car and driver.

Q. How much for additional passengers?

A. Five cents for each additional passenger.

Q. Each way?

A. Each way, yes, sir.

THE COURT: Anything further of Mr. Vaughan?

MR. MacMILLAN: Your Honor, we rest.

MR. WILLCOX: We rest, your Honor.

MR. MacMILLAN: Your Honor, I might ask one question of Mr. White. It just occurred to me. I nitended to ask him and forgot it.

THE COURT: Mr. White was sworn the other day. No need to swear him again.

HARRY L. WHITE, JR., RECALLED

EXAMINED BY MR. MacMILLAN:

Q. Mr. White, during the course of mediation, either in Norfolk or in Washington, was any offer of arbitration made to you by the defendant?

THE WITNESS: Do I have to answer that question, Judge?

MR. WILLCOX: If your Honor please, that is a question I understood you to rule out.

THE COURT: No, I ruled out the details of any offer. I didn't rule out —

MR. WILLCOX: I object to it on the ground that it is immaterial and irrelevant.

THE COURT: Objection overruled.

A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested all the possible means of settling the dispute. But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. It was just one

of the suggestions that were made I suppose to both sides by the mediator. We have not received any offer to arbitrate from the organizations nor have we made any.

Q. Did the mediator communicate to you any offer from the defendants to arbitrate?

A. He did not specifically ask us if we would arbitrate.

Q. Did he —

A. This is behind closed doors now.

Q. I am not asking you did he specifically ask you to. I am asking you whether he communicated to you an offer from the defendants to arbitrate.

A. He did not. He consistently said they would not arbitrate; that they would not go to the mediation — I mean to the Adjustment Board or would not consider a special system board of adjustment. That file, the last telegram we got closing out the case —

Q. I am asking you now about Norfolk. We'll get to the other in a minute. You said no offer of arbitration was ever communicated to you by Mr. Roadley?

A. It was not.

Q. But suggestion of arbitration was made?

A. No. He mentioned the ways that the case could be progressed. We told him from the outset that we had a rule in the book which we thought gave us a right to make this change; we did not feel negotiations were necessary. We hadn't offered to negotiate. We hadn't received a request. The only thing that the file will show, and the Brotherhood's records will show, that they made the statement we had no

right to make the change without negotiations in accordance with the Railway Labor Act as amended.

Q. You are saying that at no time did Mr. Roadley communicate any offer of arbitration from the defendants?

A. He did not.

Q. Now, when the National Mediation Board proffered arbitration at the conclusion of the case, you did not accept arbitration then, did you?

A. They did not proffer arbitration.

Q. I don't mean proffer it. They inquired whether you desired to arbitrate?

A. They never mentioned arbitration.

MR. WILLCOX: The letter speaks for itself, Mr. MacMillan, if you are talking about the letter from the Mediation Board.

MR. MacMILLAN: I am.

MR. WILLCOX: Look at the letter.

A. Sure it was introduced the last time. It is a letter of June 30th, I think.

THE COURT: Here is a letter of June 30th, introduced as Plaintiff's Exhibit No. 1, signed by E. C. Thompson, Executive Secretary of the National Mediation Board, addressed to Mr. White, and also to the several presidents or grand chief engineers of the Brotherhoods. Do you wish to see it, Mr. MacMillan?

MR. MacMILLAN: I am attempting to find that letter and the complainant's reply to the letter.

MR. WILLCOX: Both in evidence.

MR. MacMILLAN: Just so they are in evidence.

MR. WILLCOX: We offered just one paragraph and you offered the whole letter from the complainant.

Q. (By Mr. MacMillan) Mr. White, did you ever have any communication with the Mediation Board after the letter of July 30th addressed to you from Mr. Thompson? Look at that letter.

A. I have a file there I'd like to get to refer to it. I have a complete record of everything that has happened.

Q. I show you a letter designated Defendant's Exhibit 1 and ask you if that is the letter you wrote in response to the letter dated July 30th, '56.

A. That is the letter.

Q. Did you have any other correspondence other than those letters on the question of arbitration?

A. We haven't had any correspondence. We had no correspondence on negotiations in connection with arbitration as such.

Q. That is not my question.

A. You mentioned arbitration.

Q. I beg your pardon. You might have misunderstood me.

A. No. I understood you to say arbitration.

A. After the letter of August 13th, which you wrote Mr. Thompson, have you had any other letters from the Mediation Board dealing with the question of arbitration? The answer is either yes or no.

A. I have to have time to look at my file.

Q. That is all I am asking. You are welcome to examine the file as much as you need.

A. I have had several letters since that time.

Q. Did any of them deal with the question of arbitration?

A. None whatsoever.

Q. I am talking about after August 13th now. None dealt with arbitration?

A. (Shaking head in negative.)

Q. Did you ever accept the suggestion of arbitration as contained in the letter of Mr. Thompson to you under date of July 30th?

A. That is not arbitration, sir. That was a special system board of adjustment, which is quite a distinction between arbitration. We didn't talk about arbitration.

Q. You didn't talk about it?

A. No, sir.

Q. And you didn't offer?

A. Didn't offer; because we have consistently contended —

Q. Just answer my question. You did not offer arbitration?

A. We did not offer arbitration.

THE WITNESS: May I say a word there, Judge, in that connection?

THE COURT: I guess you had better get Mr. Willcox —

THE WITNESS: I will wait until he asks me then.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. Mathews said that in 1941 he advised you that the railroad employees were abandoning their time claims in connection with Money Point because they had found out that the Adjustment Board did not have jurisdiction. Did you ever receive any such advice?

A. No, sir.

Q. In connection with the questions that Mr. MacMillan just asked you about arbitration. I thought I understood you to say that one of the mediators said the men would not arbitrate?

A. They did.

Q. You remember which one that was?

A. Mr. Roadley.

Q. Now, August 13th you replied to the Mediation Board's letter of July 30th. Afterwards did you get a telegram from the board?

A. Yes, sir, I did.

Q. Will you read that telegram to the Court?

A. Telegram is dated August 16th, 1956, 10:53 a.m. It is addressed to H. L. White, Jr., President and General Manager, Norfolk Portsmouth Belt Line Railroad Company, Norfolk, Virginia. It reads as follows:

"Re this board Case E-28, Norfolk and Portsmouth Belt Line Railroad, BLE, BLF&E, and BRT on subject of establishment of point in Berkley Yard, Norfolk, as point for going on and off duty of certain yard crews, the organizations have notified this board that they are not agreeable to referring dispute to either First Division, National Railroad Adjustment Board, or special board of adjustment. The carrier's position is that any claims arising out of the proposed change, if and when made, should be progressed through National Railroad Adjustment Board, First Division. Under these circumstances you are hereby notified that the board mediation efforts in this dispute have been terminated and our file on this case has been closed as of this date by direction of the National Mediation Board. Joint White, Brown, Gilbert, Kennedy. Signed E. C. Thompson, Executive Secretary."

MR. WILLCOX: That is all.

MR. MacMILLAN: No other questions.

THE COURT: I think that telegram ought to come in if it is not already in.

MR. WILLCOX: If your Honor please, it is alleged in the complaint and admitted, I believe. But I wanted your Honor to have the benefit of it during argument.

THE COURT: That is perfectly all right. If it is in the pleadings; I haven't had an opportunity to go through them entirely.

MR. WILLCOX: It is quoted starting on page 9 of the complaint.

Your Honor please, may I speak to Mr. White?

THE COURT: Yes, He said he had something he might want to say.

All finished with Mr. White, gentlemen?

MR. WILLCOX: Yes.

THE COURT: Nothing further, gentlemen?

MR. MacMILLAN: Nothing further.

(After a brief recess, the Court heard arguments of counsel).